Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1457

MICHAEL McCLOUD - - - - - Petitioner

versus

JOHN P. HAYES - - - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

		PAGE
Table of Citations		ii
Opinion Below		1
Jurisdiction		1
Question Presented		2
Statute Involved		2
Statement of the Case		2–3
Argument		4–11
Conclusion		11
Appendix A:	Opinion the United States Sixth Circuit Court of Appeals	13
Appendix B:	Complaint for Injunction, Attachments A, B, C	14–26

TABLE OF CITATIONS

Cases:

	PAGE
Abernathy v. *Commonwealth*, Ky., 439 S. W. 2d 949 (1969)	7
Barker v. *Wingo*, 407 U. S. 514, 536, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)	9
Blanton v. *Commonwealth*, Ky., 429 S. W. 2d 407 (1968)	7
Bramlett v. *Peterson*, 307 F. Supp. 1311, 1322 (M.D. Fla. 1968)	10–11
Brown v. *Commonwealth*, Ky., 445 S. W. 2d 845 (1969)	7, 8
Broyles v. *Commonwealth*, Ky., 267 S. W. 73 (1954)	8
Farmer v. *Commonwealth*, Ky., 450 S. W. 2d 494 (1970)	7, 8
Holt v. *Brown*, 336 F. Supp. 2 (D.C., Ky. 1971)	10
Mitchum v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)	11
Parker v. *Gladden*, 385 U. S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)	6–7, 9
Postell v. *Commonwealth*, 174 Ky. 272, 192 S. W. 39 (1917)	8
Ringo v. *Commonwealth*, Ky., 346 S. W. 2d 21 (1961)	7, 8
Younger v. *Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1970)	10, 11

Constitutional Provisions:

United States Constitution, Amendment VI	4
Kentucky Constitution, Amendment XIV	4

Authorities:

ABA Standards, *The Function of the Trial Judge*, (1972)	8– 9

Statutory Provision:

42 U.S.C. §1983	10

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

MICHAEL MCCLOUD - - - - - *Petitioner*

v.

JOHN P. HAYES - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS TO THE SUPREME COURT OF THE UNITED STATES

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals was issued on January 7, 1976, and entered on January 12, 1976. This decision will not be published. A copy of that opinion is presented to the Court in Appendix A attached hereto.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was issued on January 7, 1976, and entered on January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the District Court erred when it dismissed Petitioner's Complaint and refused to enjoin the respondent from making prejudicial remarks to the jury panel.

STATUTE INVOLVED

42 U.S.C.A. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, MICHAEL MCCLOUD, filed a Complaint for Injunction (Appendix B) in the United States District Court for the Western District of Kentucky against the respondent, JOHN P. HAYES, Judge of the Jefferson Circuit Court, Criminal Branch, Second Division, on January 23, 1975, alleging that it was the policy, pattern and practice of the Judge, acting under color of state law, custom and usage to make prejudicial remarks concerning parole to jurors. Affidavits supporting this allegation were attached to said Complaint. MCCLOUD stated that he was scheduled

for trial in the Judge's Court on January 14, 1975, and he feared that his Sixth Amendment right to a fair trial by an impartial jury would be jeopardized. MCCLOUD asked the Court to enter an Order restraining the Judge from making remarks to jurors regarding the effect of parole on any sentence which the jury might pass, until a hearing could be had on his motion for preliminary injunction, and further that a preliminary injunction be issued until a final hearing could be had on the matter. MCCLOUD filed a motion for temporary restraining order on the same date, January 23, 1975.

On January 27, 1975, an Order was entered overruling MCCLOUD's motion for a restraining order and giving the Judge 20 days to file a motion for dismissal.

On February 18, 1975, the Judge filed a motion to dismiss and a memorandum in support thereof. On February 26, 1975, MCCLOUD filed a memorandum in response to appellee's motion to dismiss.

An Order was entered on July 7, 1975, dismissing the action.

MCCLOUD filed his notice of appeal on August 1, 1975, appealing the Judgment of the lower court to this Court. On January 12, 1976, the Sixth Circuit Court of Appeals filed an Order affirming this decision (Appendix A).

ARGUMENT

The record shows that the respondent, Judge John P. Hayes, has engaged in a pattern of conduct which effectively denies petitioner, Michael McCloud, his constitutional rights to a fair trial as enumerated in the Sixth Amendment to the United States Constitution and made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

The Judge has repeatedly held discussions with jury panels and individual jurors whose term of service was not yet completed, in which parole eligibility was discussed.

> Mrs. Lowry asked the judge when does a person become eligible for parole after receiving a sentence of fifteen years to which the judge replied, "one year." (Appendix B, Complaint for Injunction, Attachment A.)
>
> * * * * * * *
>
> The exact answer given by the trial court is not shown in the record, but the trial judge admitted in the discussion of the question with counsel for the appellant that he did answer the question and that he may have told the inquirer that the one so convicted was eligible "too soon." (Appendix B, Complaint for Injunction, Attachment B, page 2.)
>
> * * * * * * *
>
> In response to a question from one of the jurors as to actual punishment received when a sentence is given out the judge said that a defendant receiving a sentence technically is eligible for parole the day he is sentenced to custody of the Kentucky Department of Corrections. He further stated that he felt that there was no justice in the system as it exists today. At this point a female juror inquired as to how much time the defendant who had pleaded guilty and received a life sentence in the court that day would have to serve. The judge again said that he is eligible for parole at the time he is sentenced to custody of the Kentucky Department of Correctitons, but that as a matter of course he would normally serve six years on a life sentence. (Appendix B, Complaint for Injunction, Attachment C, paragraph 2.)

Further, the Judge has complained to these jury members that the sentencing, correctional and parole procedures are so lenient as to make the jury's role meaningless (Appendix B, Complaint for Injunction, Attachment B).

> He further stated that he felt that there was no justice in the system as it exists today. Appendix B, Complaint for Injunction, Attachment C, page 1, paragraph 2).
>
> * * * * * * *
>
> He inferred that certain laws were passed in Frankfort by the Legislature that were lenient toward defendants because social workers and people of that sort had a strong lobby in Frankfort. He also told the jury that the only way they could make sure a man remained locked-up was to give him life without the privilege of parole and they could only do that when a man is charged with rape. Appendix B, Complaint for Injunction, Attachment C, pages 1 & 2, paragraphs 3).
>
> * * * * * * *

> He stated that the way the system is currently set up there is no need for judges or juries. (Appendix B, Complaint for Injunction, Attachment C, page 2, paragraph 3.)

Finally, the Judge has admittedly held these discussions on various occasions as shown by the number of occasions cited in the record (Appendix B, Complaint for Injunction Attachments A, B and C), and has expressed his intention to continue doing so.

> He said he was going to continue informing jurors until he was told to cease by the Court of Appeals. (Appendix B, Complaint for Injunction, Attachment C, page 3.)

It is only logical to assume that these discussions will continue to be held and that the content of them will often be unknown to defense counsel. In fact, the Judge has expressly indicated a desire to prevent any defense attorney from hearing certain remarks he makes to a prospective jury panel (Appendix B, Complaint for Injunction, Attachment C).

> In his closing to the jury, Judge Hayes stated that on the last day of the jury term he would tell the jurors some things that would really open their eyes, but he stated that there were two defense attorneys in he courtroom at this time and he wouldn't go further in the matter. (Appendix B, Complaint for Injunction, Attachment C, page 2, paragraph 4.)

This Court in *Parker* v. *Gladden,* 385 U. S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966), has found prej-

udicial and constitutional error when a bailiff made private remarks to a jury concerning the guilt of the accused and the potential for correction of an erroneous verdict by appeal. This Court condemned this practice as violative of the defendant's constitutional rights to confront the witnesses against him and to cross-examine those witnesses. When the remarks of a bailiff are held to be that harmful, certainly any such remarks made by a judge would be more influential to a jury and hence, more harmful.

Decisions by the highest state court in Kentucky, the Court of Appeals, have repeatedly condemned the slightest reference by the trial judge to parole eligibility. Thus, the judge may not answer a juror's question during deliberations about the parole eligibility of a defendant under various sentence. *Brown* v. *Commonwealth,* Ky., 445 S. W. 2d 845 (1969); *Ringo* v. *Commonwealth,* Ky., 346 S. W. 2d 21 (1961). When asked about parole during a trial, the only acceptable response of the trial judge is to admonish the jury to decide the case on the law and the evidence. *Blanton* v. *Commonwealth,* Ky., 429 S. W. 2d 407 (1968). Indeed he may not even answer such a question by replying that the matter is for the parole board to decide. *Abernathy* v. *Commonwealth,* Ky., 439 S. W. 2d 949 (1969). By the same token, the trial judge should not discuss probation or parole with the jurors at the beginning of the term. *Farmer* v. *Commonwealth,* Ky., 450 S. W. 2d 494 (1970).

The prohibition against consideration of parole eligibility is not merely procedural under the estab-

lished case law. As the Kentucky Court of Appeals has correctly indicated, the consideration in a judicial proceedings of the possible subsequent conduct of another department of state government violates the principle of separation of powers, as guaranteed by Sections 27 and 28 of the Kentucky Constitution. *Broyles* v. *Commonwealth,* Ky., 267 S. W. 73 (1954); *Postell* v. *Commonwealth,* 174 Ky. 272, 192 S. W. 39 (1917).

The Kentucky Court of Appeals has recognized that an effect of disclosure of parole eligibility to a jury during its term of duty is to minimize in the minds of the jurors the importance of their sentencing function. See *Farmer* v. *Commonwealth* and *Ringo* v. *Commonwealth,* both *supra.* It may also be presumed to have the effect obviously intended by the judge of producing higher sentences to nullify progressive rules governing parole eligibility. See *Brown* v. *Commonwealth, supra.*

In addition to the holdings of the Federal Courts and the Court of Appeals of Kentucky relative to judicial conduct, the American Bar Association has dealt recently at length with the minimum standards of conduct required of a trial judge. See ABA Standards, *The Function of the Trial Judge* (1972). He is required in general to avoid impropriety and to remain impartial.

> The trial judge should avoid impropriety and the appearance of impropriety in all of his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *Id.* at §1.5.

In another section, the judge's remarks to the jury are limited in their scope.

> While it is appropriate for the trial judge to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict. *Id.* at §5.13.

It is apparent that the American Bar Association is attempting to eliminate the type of conduct exhibited by the judge.

Because of the Judge's remarks, McCloud was forced either to proceed to trial with a jury panel prejudiced by the Judge's statements or to request a continuance. The first option is unacceptable since McCloud would be relinquishing his basic constitutional right to a fair trial. *Parker* v. *Gladden, supra.* The second option is unacceptable for two reasons. One, a defendant has a constitutional right to a speedy trial and a request for a continuance on the basis of prejudice does not waive that right. *Barker* v. *Wingo,* 407 U. S. 514, 536, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). Two, a continuance to another term would not cure the constitutional infirmity since the Judge has stated he will continue to address his juries (Appendix B, Complaint for Injunction, Attachment C).

> He said he was going to continue informing the jurors until he was told to cease by the Court of Appeals. (Appendix B, Complaint for Injunction, Attachment C, page 3.)

Thus, McCloud would suffer irreparable injury by forfeiting his constitutional right to a fair trial regardless of the choice he made. The only requisite for relief under 42 USC §1983, deprivation of a constitutional guaranteed right by a person acting under color of state law, was established. *Holt* v. *Brown,* 336 F. Supp. 2 (D.C. Ky. 1971).

In its decision denying McCloud any relief, the District Court relied on the Supreme Court case of *Younger* v. *Harris,* 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1970), wherein the court declined to enjoin a state court prosecution. It is essential to note that the relief requested in the case now under consideration by this court is different from that in *Younger* v. *Harris, supra.* In the present case, McCloud does not request that the state criminal prosecution be enjoined. Rather, McCloud seeks only to enjoin the appellee judge from making remarks to the jury panel which will prejudice McCloud's right to a fair trial.

The injunction sought by McCloud is not without precedent in the Federal Courts under 42 USC §1983. In *Bramlett* v. *Peterson,* 307 F. Supp. 1311, 1322 (M.D. Fla. 1968), the District Court stated:

> Injunctive relief under 42 U.S.C. §1983 in federal courts is not predicated upon, nor excluded by, available relief procedures under state law. (At p. 1320).

The Court in *Bramlett* v. *Peterson, supra,* granted the request for an injunction to prevent state court judges

from consistently failing to inform indigent defendants of their Sixth Amendment right to counsel.

In a recent case decided by this Court after the *Younger* v. *Harris, supra,* decision, this Court stated unequivocally that 42 USC §1983 empowered the Federal Courts to enjoin a proceeding in a state court under certain circumstances. *Mitchum* v. *Foster,* 407 U. S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972).

CONCLUSION

The petitioner Michael McCloud, has shown that the respondent, Judge John P. Hayes, has consistently engaged in a pattern of conduct which violates McCloud's constitutional right to a fair trial. This constitutional violation is perpetrated under color of state law through a state criminal proceeding.

The injury to McCloud is irreparable and will remain such until the Judge is enjoined by this Court.

WHEREFORE, McCloud respectfully asks this Court to grant certiorari to decide these questions.

Respectfully submitted,

JOHN TIM MCCALL
Member of the Bar of the Supreme Court of the United States
835 West Jefferson Street
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

APPENDIX A

No. 75-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL MCCLOUD, - - - - *Plaintiff-Appellant*

v.

JOHN P. HAYES, - - - - *Defendant-Appellee*

ORDER—Filed January 12, 1976

BEFORE: WEICK, CELEBREZZE, and MCCREE, Circuit Judges.

This appeal from a judgment dismissing the complaint for failure to state a claim upon which relief could be granted is before the court pursuant to Rule 3(e) of the Sixth Circuit. The sole issue is whether the district court erred in refusing to enjoin appellee, a judge of the Jefferson Circuit Court, from making prejudicial remarks concerning parole to the county jury panel from which the petit jury would be drawn in the trial of an indictment charging appellant with an offense against the Commonwealth of Kentucky.

It appearing that the questions on which decision of the court depends are so insubstantial as not to need further argument, upon consideration, it is ORDERED that the judgment be, and it hereby is, AFFIRMED for the reasons set forth in the order of the district court. Rule 8, Rules of the Sixth Circuit.

Entered by order of the court
(s) Illegible
Clerk

ISSUED AS MANDATE: January 7, 1976
COSTS: None

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

MICHAEL MCCLOUD - - - - - - - *Plaintiff*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Louisville, Kentucky - - - - - - - - - *Defendant*

COMPLAINT FOR INJUNCTION

Plaintiff, MICHAEL MCCLOUD, for his claim of relief, states:

1. Plaintiff is MICHAEL MCCLOUD of 3916 River Park Drive, Louisville, Kentucky, and is a resident of the Commonwealth of Kentucky.

2. Defendant is JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, and is a resident of the Commonwealth of Kentucky.

3. Jurisdiction of this Court is based on 42 U.S.C. 1983, and the United States Constitution, Amendments VI and XIV.

4. Plaintiff is scheduled for trial on a criminal charge in defendant's Court on January 27, 1975.

5. On or about January 14, 1975, defendant held an informal question-answer session with the panel of jurors, during which defendant answered a juror's specific question regarding the timing of eligibility for parole of a person receiving a fifteen (15) year sentence. (See Attachment A).

6. Defendant also answered another juror's question about the relationship between a jury trial and eligibility for parole.

7. Defendant made these remarks concerning parole to the jury panel on the jury's second day of service, and this group of jurors will still be serving on January 27, 1975, the date of plaintiff's trial.

8. It has been the past practice of defendant to address remarks similar to those described above to jurors in his Court, as well as more specific comments and predictions regarding the length of the sentences of various defendants and the actual time which they would serve, given the parole system. (See Attachments B and C.)

9. Plaintiff's attorney recently discussed these remarks and their prejudicial nature with defendant Hayes, and the defendant indicated that he intended to continue his practice until a higher court directed him to cease his activities.

10. On or about January 27, 1975, the scheduled date for plaintiff's trial, plaintiff's attorney will obtain a continuance of the trial on the grounds that plaintiff's opportunity for a fair trial has been impaired by defendant's prejudicial remarks to the jury.

11. Since the trial must be postponed, plaintiff has been deprived of his Sixth Amendment right to a speedy trial by the prejudicial remarks made by defendant, acting under color of state law, custom and usage.

12. Since it is the policy, pattern and practice of the defendant, acting under color of state law, custom and usage to make such prejudicial remarks concerning parole to jurors, plaintiff fears that his Sixth Amendment right to a fair trial by an impartial jury will be jeopardized in the future.

13. Plaintiff has no other adequate remedy at law, and unless defendant is restrained from thus prejudicing jurors in the future, plaintiff will suffer the great and irreparable harm of either being tried by a biased jury or again having his trial postponed.

WHEREFORE, plaintiff prays that the Court enter its Order restraining defendant from making any further remarks to jurors regarding the effect of parole on any sentence which the jury might pass until hearing can be had on a motion for preliminary injunction; that a preliminary injunction be issued until final hearing can be had in the above matter; and that on final hearing, said injunction be made permanent.

(s) John Tim McCall
100 North Sixth Street,
Suite 504
Louisville, Kentucky 40202
589-6190

Counsel for Plaintiff

MICHAEL MCCLOUD, of lawful age, being first duly sworn, states that he is the plaintiff named in the above and foregoing Complaint and that the facts stated therein are true according to his best knowledge and belief.

(s) Michael McCloud

SUBSCRIBED, SWORN & ACKNOWLEDGED to before me by MICHAEL MCCLOUD on this 22 day of January, 1975.

My commission expires 8-31-76.

(s) Bonita A. Thomas (Burch)
Notary Public, State at Large

ATTACHMENT A

AFFIDAVIT

Comes Terrence R. Fitzgerald, being first duly sworn, and states as follows:

On September 15, 1975, at approximately 9:40 a.m. I attempted to enter the courtroom of the Jefferson Circuit Court, Criminal Branch, Second Division, on legal business. The door to the courtroom was locked. I looked through the window and observed Judge John P. Hayes addressing a panel of prospective jurors. One of his regular bailiffs was tending the door, and he allowed several police officers to enter and leave the courtroom. When he opened the door for one of the police officers, I asked him whether I could come in. He indicated that I could not and quickly closed and locked the door. I do not know how long the judge addressed the jury panel altogether. I do know that the door remained locked for approximately ten minutes after my arrival at the courthouse.

Further the affiant sayeth not.

(s) Terrence R. Fitzgerald

Subscribed and sworn to before me by Terrence R. Fitzgerald this 25 day of September, 1975.

My commission expires 7/5/76.

(s) Patricia Gail Bowen
Notary Public, State at Large,
Kentucky

ATTACHMENT B

Reginald David SCOTT, a/k/a Reginald Anthony Davis, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.
Court of Appeals of Kentucky.
March 17, 1972.

As Modified on Denial of Rehearing
June 29, 1973.

Defendant was convicted before the Circuit Court, Criminal Branch, Jefferson County, John P. Hayes, J., of wilful murder, and he appealed. The Court of Appeals, Edward P. Hill, Jr., J., held that defendant was not entitled, in prosecution in which trial judge stated "gentlemen of the jury, the defendant closes without proof. This is [defendant's] prerogatiye.", to instruction that jury not indulge any presumption against defendant by reason of his failure to testify.

Amended and affirmed.

1. Homicide (Key) 157(1), 166(5)

Testimony concerning fact that assault and battery warrant had been issued for defendant on complaint of murder victim two weeks prior to shooting was admissible in prosecution for wilful murder to show state of feeling that existed between defendant and victim and possibly to show motive for shooting.

2. Criminal Law (Key) 1120(1)

Record on appeal from wilful murder conviction revealed, contrary to contention that defendant was prejudiced by evidence that he had been arrested in another state

on another charge, that there was no evidence of arrest on another charge.

3. Criminal Law (Key) 1166.22(2)

That, several days before defendant's trial on willful murder charge, trial judge answered juror's question as to when certain person, who was given 16-year sentence, would be eligible for parole, and may have told inquirer that one so convicted was eligible "too soon" did not prejudice defendant whose penalty was fixed at death.

4. Criminal Law (Key) 393(1)

Single-verdict trial of defendant on charge of wilful murder did not violate defendant's right against self-incrimination, notwithstanding contention that it prevented him from offering mitigating circumstances on question of punishment in situation in which he chose not to testify in his own behalf on question of guilt.

5. Criminal Law (Key) 737(1)

Defendant was not entitled, in criminal prosecution in which trial judge stated "gentlemen of the jury, the defendant closes without proof. This is [defendant's] prerogative.", to instruction that jury not indulge any presumption against defendant by reason of his failure to testify.

Daniel T. Taylor, III, John Tim McCall, Charles Scott, Louisville, for appellant.

John B. Breckinridge, Atty. Gen., John M. Famularo, Asst. Atty. Gen., Frankfort, for appellee.

EDWARD P. HILL, Judge.

The appeal is from a judgment finding the appellant guilty of the wilful murder of Dorothy Jean Carson and fixing his penalty at death.

The evidence on the trial showed that in June 1969 the appellant shot and killed Dorothy Jean Carson in the presence of her two children in her apartment in a Louisville housing project; that the appellant and the deceased, a divorcee, had been living together for some time; that before the killing an argument was waged between the appellant and the deceased during which the appellant drew a pistol from his jacket; that he did not discharge the pistol but at the request of a companion, a Mr. Gilmore, replaced it; and that shortly thereafter, the appellant again removed the pistol and shot the deceased in the left temple. The appellant was observed by a number of people as he left the scene of the tragedy. There was ample evidence of identification of appellant as the man who did the shooting.

Appellant denied the charge to the arresting officers and claimed his name was Reginald Anthony Davis and that he was never in Kentucky prior to his extradition from the state of New York.

The appellant, as he had a right to do, did not take the witness stand or testify in his own behalf. Four contentions are presented in an effort to reverse the judgment.

[1, 2] First the appellant argues that the trial court erred in allowing testimony concerning the fact that an assault and battery warrant had been issued for the defendant upon complaint of the victim some two weeks prior to the shooting. He also argues that he was prejudiced by evidence that he had been arrested in New York on another charge. Insofar as the evidence pertaining to the assault and battery warrant is concerned, this testimony was competent to show the state of feeling that existed between the appellant and the deceased and possibly to show a motive for the shooting. Quarles v. Commonwealth, Ky., 245 S. W. 2d 947 (1952); Leigh v. Commonwealth, Ky., 481 S. W. 2d 75 (decided February 4, 1972); and Wigmore, Evidence,

§§ 300, 216. On the other point, there was no evidence of an arrest in New York on another charge.

[3] The appellant next assigns as error an occurrence in the courtroom some days before the trial of the present case when one of the jurors asked the trial judge when a man, theretofore convicted in the court and given a sixteen-year sentence, would be eligible for parole. The exact answer given by the trial court is not shown in the record, but the trial judge admitted in the discussion of the question with counsel for the appellant that he did answer the question and that he may have told the inquirer that the one so convicted was eligible "too soon."

In Abernathy v. Commonwealth, Ky., 439 S. W. 2d 949 (1969), we discussed a question similar to the one here presented. We now answer appellant's second contention by quoting from Abernathy, supra, at page 952:

> "We do not condone the remark made by the trial court in this case. In fact, we hold it was an error. But as in the instance of any other error, we are enjoined by RCr 9.24 and 9.26 to disregard it unless we are of the opinion that it affected the 'substantial rights' of the defendants. * * * What it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held non-prejudicial."

See also Caine v. Commonwealth, Ky., 491 S. W. 2d 824 (1973).

[4] Another claimed error is that the single-verdict trial violated appellant's right against self-incrimination because it prevented him from offering mitigating circumstances on the question of punishment where he chose not to testify in his own behalf on the question of his guilt or innocence.

The answer to this question may be found in Crampton v. Ohio, 402 U. S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971), wherein the Supreme Court of the United States upheld a similar proceeding used in the state of Ohio. The appellant cites Campton but urges this court to adopt the minority opinion therein. We have no desire to do this; and if we did, we would hesitate to so do.

[5] Finally the appellant insists that he was entitled to a written admonition at the close of the whole case instructing the jury not to indulge any presumption against him by reason of his failure to testify.

The Commonwealth argues that the trial court in effect admonished the jury when, at the close of the trial and after the attorneys for the appellant announced they were closing the case without offering any evidence on behalf of the defendant, the trial judge made the following statement to the jury: "Gentlemen of the jury, the defendant closes without proof. This is Mr. Scott's prerogative." Of course this comment announcing to the jury the prerogative or right of the defendant not only expressed his right not to offer any evidence in his own behalf, but also included his right not to take the witness stand himself. Without deciding the sufficiency of the admonition given, this court in a long line of decisions has held that the defendant under these circumstances is not entitled to an admonition. In the relatively recent case of Roberson v. Commonwealth, 274 Ky. 49, 118 S. W. 2d 157, it was written:

> "After appellant's motion for a peremptory instruction was overruled, he moved the court to admonish the jury not to consider his failure to testify, and 'not to allow a presumption of guilt to arise in their minds from his failure to testify'. The court properly overruled the motion."

In the earlier case of Hanks v. Commonwealth, 248 Ky. 203, 58 S. W. 2d 394,this court held that the defendant was not entitled to an instruction on his failure to testify, citing the early case of Tines v. Commonwealth, 77 S. W. 363, 25 Ky. Law Rep. 1233. This court said at page 364 of Tines:

> "In No. 4, the jury were instructed 'that they shall not comment upon the failure of the defendant to testify; neither shall they draw any presumption of his guilt from his failure to testify.' "

It is concluded that under our case law the appellant is not entitled to an admonition pertaining to his failure to testify in his own behalf.

This court is conscious of the dictum in Spencer v. Commonwealth, Ky., 467 S. W. 2d 128 (1971). In fact, the author of Spencer is now the author of the opinion in the instant case, which all goes to prove that a careless foxhound may sometimes lead the whole pack astray. We now repudiate the dictum in Spencer, supra.

The punishment is reduced to the only lower penalty authorized by KRS 435.010, which is life imprisonment. Caine v. Commonwealth, Ky., 491 S. W. 2d 824 (1973).

The judgment should be amended to reduce the sentence from death to life imprisonment. As so amended, it is affirmed.

All concur.

ATTACHMENT C

AFFIDAVIT

Comes the affiant, James B. Adams, Jr., of 1000 Republic Building, Louisville, Kentucky being first duly sworn does hereby depose that on the 9th day of December, 1974, he was present in the courtroom of Hon. John P. Hayes, Judge of the Second Division of the Jefferson Circuit Court, Criminal Branch when the judge addressed certain remarks to the entire jury panel. The affiant is not sure of the sequence of events or in which order certain remarks were made, but simply that these certain remarks were made in the presence of the jury panel and directed to the panel.

The judge was reviewing with the jury panel the cases that had been disposed of during that day. In response to a question from one of the jurors as to actual punishment received when a sentence is given out the judge said that a defendant receiving a sentence technically is eligible for parole the day he is sentenced to custody of the Kentucky Department of Corrections. He further stated that he felt that there was no justice in the system as it exists today. At this point a female juror inquired as to how much time the defendant who had pleaded guilty and received a life sentence in the court that day would have to serve. The judge again said that he is eligible for parole at the time he is sentenced to custody of the Kentucky Department of Corrections, but that as a matter of course he would normally serve six years on a life sentence.

The judge also talked to the jury about a new furlough law whereby the warden of the institution could allow a prisoner to go home for seven days and then return to the institution and then furlough him again for seven days. The judge said that this gives the superintendent of the

institution the power of parole. He inferred that certain laws were passed in Frankfort by the Legislature that were lenient toward defendants because social workers and people of that sort had a strong lobby in Frankfort. He also told the jury that the only way they could make sure a man remained locked-up was to give him life without the privilege of parole and they could only do that when a man is charged with rape.

The judge stated to the jury that they may spend two to three hours in the jury room deciding whether a man should receive five or ten years for a certain offense, when it actually does not make even a day's difference as to the amount of time he will actually serve. The judge further stated to the jury that there were hundreds of things in the New Penal Code that if the public was aware of they would be up in arms against the State Legislature for having enacted it.

He told the members of the panel that certain people wanted them as members of a jury to be ignorant of the law and what was going on in the courtroom and he felt that they should know as much as possible.

The same juror that had previously asked the question, stated in the presence of the remainder of the panel that he was in Europe after World War II and had been in various other countries but that his experience here as a juror was the most eye opening one that he had ever had. He stated that he felt society must do something to protect itself from the criminals on the streets or that all of society would collapse. Judge Hayes agreed with him and again stated that there was no justice and could be no justice under our current system. He also stated that the five years he had been on the bench was the most frustrating time he had spent anywhere. He stated that the way the system is currently set up there is no need for judges or juries.

In his closing to the jury, Judge Hayes stated that on the last day of the jury term he would tell the jurors some things that would really open their eyes, but he stated that there were two defense attorneys in the courtroom at this time and he wouldn't go further in the matter. He stated that they have already gotten one judge in trouble, that he agreed with that judge and that he was going to continue telling the jurors about the system as it exists here, because he feels that the people have a right to know. He said he was going to continue informing the jurors until he was told to cease by the Court of Appeals. He also stated that he had been taken to the Court of Appeals on this question before and that he was affirmed so he really was not concerned.

(s) James B. Adams, Jr.

Subscribed and sworn to before me by James B. Adams, Jr., this 16 day of December, 1974.

My commission expires: May 17, 1977.

(s) Illegible
Notary Public, State at Large,
Kentucky